Borneo Helicopters Sdn Bhd & Ors v Sabah Air Aviation Sdn Bhd (formerly known as Penerbangan Sabah Sdn Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–820–04 OF 2012
AZAHAR MOHAMED, LINTON ALBERT AND DAVID WONG JJCA
11 NOVEMBER 2014

Contract — Agreement — Breach — Parties entered into management agreement — Request for delivery of bank guarantee — Shareholder unilaterally and without consent of majority shareholder surrendered agreement — Issuance of memo — Declaration that memo was null and void and of no effect — Termination notice issued and claim for management — Whether management agreement wrongfully repudiated — Whether there was express provision of delivery of bank guarantee when management agreement was entered into between parties

This was an appeal against the decision of the High Court relating a management agreement entered into between the respondent and the first appellant. The respondent carried on the principle activities of air transportation and aircraft maintenance services and was the holder of an air service permit issued by the Ministry of Transport and an Air Operator Certificate issued by the Department of Civil Aviation, Malaysia. A memorandum of understanding ('the MOU') was made between Sabah Government and the first appellant in respect of management takeover of the respondent. On 29 April 2008, the respondent and the first appellant executed a management agreement. Under cl 1.02(a) of the management agreement, it was deemed to have commenced on 1 January 2008 for a period of ten years subject to a periodical review at the end of every five years. It was pursuant to this management agreement that the respondent appointed the first appellant as management contractor to review, rebrand, redevelop and reorganise the respondent. The respondent requested from the second appellant for the delivery of a bank guarantee and the latter informed the former that the first appellant was in the process of making arrangements to deliver the bank guarantee. The 49% shareholder of the first appellant ('Abdul Ghani') unilaterally and without the consent of the majority shareholder, conveyed his proposal to amicably surrender the management agreement to the respondent and the respondent's board resolved to accept Abdul Ghani's proposal. A memo was issued to notify all the respondent's staff of the first appellant's intention to amicably surrender the management agreement to the respondent. It was also stated in the memo that the respondent's board had decided that the representative of the first appellant, namely the second appellant and all consultants engaged by him were to be relieved of their roles and

responsibilities with immediate effect. In the High Court, the first appellant sought for a declaration that the memo by the respondent was null and void and of no effect. The first appellant obtained an ex parte interim injunction to restrain, among others, the respondent from preventing the first appellant from carrying out the management services, roles, responsibilities, duties and functions in accordance with the management agreement. The respondent, in the meantime, entered into a helicopter lease agreement with Layang-Layang Udara Sdn Bhd ('HLA') and further, issued a notice of termination of the management agreement ('the termination notice') to the first appellant. The first appellant, through the third appellant demanded the respondent to withdraw the termination notice and the management fees in the sum of RM2,453,266. The first appellant filed a claim in the High Court on the ground that the respondent had wrongfully repudiated the management agreement. In its counterclaim against the appellants, the respondent alleged fraud and conspiracy. The High Court concluded that the first appellant's failure to provide a bank guarantee constitutes a fundamental breach entitling the termination of the management agreement by the respondent. Hence, the present appeal. The respondent argued that the management agreement expressly provided that the first appellant was to deliver a bank guarantee in the sum of RM500,000 to the respondent the moment the management agreement was entered into between the parties. Hence it was further contended that the first appellant breached this term from day one of the management agreement.

Held, allowing the appeals and setting aside the orders of the High Court:

(1) Clause 6.02.1 of the management agreement, it is expressly provided that neither party could terminate the management agreement unilaterally except upon an event of default. The termination notice did not refer to any cls in the management agreement. The construction of a contract is a question of law to be determined by the court. To ascertain the intention of the parties, the court would read the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intention, the court does not of course inquire into the parties' subjective states of mind but make an objective judgment based on the materials already identified (see paras 31–32).

(2) The irresistible deduction to be drawn is that the crucial provision is the minimum guaranteed adjusted net profit and that the bank guarantee is only a subsidiary provision and is incidental to the profit guarantee (see para 34).

(3) Clause 7, as a contractual term specifically agreed between the first appellant and the respondent, provided that any breach of the minimum

guaranteed adjusted net profit shall not be deemed as an event of default of the management agreement on the part of the first appellant. In this way, it could not be construed that the minimum guaranteed adjusted net profit was a fundamental obligation of the management agreement. It must follow, therefore, that the bank guarantee did not form a fundamental term of the management agreement. Clause 6 of the schedule to the management agreement could not be deemed to be a condition precedent to the management agreement. The High Court was plainly wrong in this regard (see para 35).

(4) At the material time, the first appellant had already tendered the bank guarantee requested by the respondent before the termination notice was issued. The respondent accepted the same without any protest and it would be inequitable for them to assert now that there was a failure on the part of the first appellant to comply with the terms of the management agreement (see para 36).

(5) On a proper construction of the management agreement, there are two time periods in cl 6.02 which must be complied by the respondent. The first is cl 6.02.1(a)(i), which requires the respondent to give a 30 days' notice in writing to the first appellant specifying the default and requiring remedy within reasonable time. Next, is cl 6.02.1(a)(ii) which states that if the default shall continue for 60 days after receipt of such notice, the respondent shall give a notice in writing specifying when such termination shall take effect. The High Court erred in failing to properly and judicially appreciate that the management agreement on its true construction, requires the respondent to give adequate notice to the first appellant to make good the failure, neglect or contravention complained of. The High Court also erred in failing to appreciate that the respondent had in breach of cl 6.02.1(c)(iii) of the management agreement deprived the first appellant the right to be informed when the termination shall take effect (see para 40).

(6) There was no basis whatsoever for the respondent to unilaterally terminate the management agreement vide the so-called termination notice. The respondent had unlawfully terminated the management agreement. The respondent was and is at all material times liable to pay to the first appellant management fees stipulated. There was no valid reason to deny the first appellant of its contractual entitlements (see paras 42 & 44–45).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi berkaitan perjanjian pengurusan yang dimasuki antara responden dan perayu pertama. Responden menjalankan aktiviti-aktiviti utama pengangkutan udara dan servis penyelenggaraan pesawat udara dan merupakan pemegang permit servis udara

yang dikeluarkan oleh Kementerian Pengangkutan dan Sijil Operator Udara yang dikeluarkan oleh Jabatan Penerbangan Sivil, Malaysia. Memorandum persefahaman ('MP') telah dibuat antara Kerajaan Sabah dan perayu pertama berkaitan pengambilalihan pengurusan responden. Pada 29 April 2008, responden dan perayu pertama melaksanakan perjanjian pengurusan. Di bawah klausa 1.02(a) perjanjian pengurusan, ia dianggap telah dilaksanakan pada 1 Januari 2008 untuk tempoh selama sepuluh tahun tertakluk kepada ulasan berkala pada akhir setiap lima tahun. Ia adalah menurut kepada perjanjian pengurusan ini bahawa responden melantik perayu pertama sebagai kontraktor pengurusan untuk mengkaji semula, penjenamaan semula, memajukan semula dan mengatur semula responden. Responden memohon daripada perayu kedua untuk penyerahan jaminan bank dan perayu kedua memaklumkan kepada responden bahawa perayu pertama dalam proses membuat pengaturan untuk menyerahkan jaminan bank. 49% pemegang saham perayu pertama ('Abdul Ghani') mendeklarasikan secara satu pihak tanpa kebenaran pemegang saham majoriti, menyampaikan usulnya untuk secara aman menyerahkan perjanjian pengurusan kepada responden dan lembaga responden memutuskan untuk menerima usulan Abdul Ghani. Satu memo telah dikeluarkan untuk memaklumkan kepada semua pekerja responden terhadap tujuan perayu pertama untuk secara aman menyerahkan perjanjian pengurusan kepada responden. Ia turut dinyatakan di dalam memo bahawa lembaga responden telah memutuskan bahawa wakil perayu pertama, iaitu perayu kedua dan kesemua perunding dilantik olehnya adalah untuk dilepaskan peranan dan tanggungjawab mereka dengan serta-merta. Di Mahkamah Tinggi, perayu pertama memohon deklarasi bahawa memo oleh responden adalah tidak sah dan tidak mempunyai kesan. Perayu pertama memperolehi injunksi interim ex parte untuk menghalang, antara lain, responden daripada mencegah perayu pertama daripada menjalankan perkhidmatan pengurusan, peranan, tanggungjawab, kewajipan dan fungsi mengikut perjanjian pengurusan. Responden, dalam pada itu, menandatangani perjanjian pajakan helikopter dengan Layang-Layang Terbang Sdn Bhd ('PPH') dan selanjutnya, mengeluarkan notis penamatan perjanjian pengurusan ('notis penamatan') kepada perayu pertama. Perayu pertama, melalui perayu ketiga menuntut responden untuk mengeluarkan notis penamatan dan yuran pengurusan dalam jumlah RM2,453,266. Perayu pertama memfailkan tuntutan di Mahkamah Tinggi atas alasan bahawa responden telah secara salah menolak perjanjian pengurusan. Dalam tuntutan balas terhadap perayu, responden yang dikatakan melakukan penipuan dan konspirasi. Mahkamah Tinggi memutuskan bahawa kegagalan perayu pertama untuk menyediakan jaminan bank adalah pelanggaran asas yang melayakkan penamatan perjanjian pengurusan oleh responden. Oleh itu, rayuan ini. Responden berhujah bahawa perjanjian pengurusan dengan nyata memperuntukkan bahawa adalah untuk perayu pertama menyerahkan jaminan bank dalam jumlah wang sebanyak RM500,000 kepada responden sebaik saja perjanjian pengurusan telah ditandatangani di antara pihak-pihak.

Maka, adalah selanjutnya dihujahkan bahawa perayu pertama melanggar terma ini dari hari pertama perjanjian pengurusan.

Diputuskan, membenarkan rayuan dan mengetepikan perintah Mahkamah Tinggi:

(1) Klausa 6.02.1 perjanjian pengurusan, pembinaan kontrak adalah persoalan undang-undang yang akan ditentukan oleh mahkamah adalah dengan nyata memperuntukkan bahawa tiada pihak-pihak boleh menamatkan perjanjian pengurusan secara unilateral kecuali atas satu kejadian yang melanggar kontrak itu. Notis penamatan tidak merujuk kepada apa-apa klausa di dalam perjanjian pengurusan. Pembuatan kontrak adalah suatu persoalan undang-undang yang akan ditentukan oleh mahkamah. Untuk menentukan tujuan pihak-pihak, mahkamah akan membaca terma-terma kontrak secara menyeluruh, memberikan perkataan-perkataan, digunakan dalam maksud semula jadi dan biasa dalam konteks perjanjian itu, perhubungan pihak-pihak dan kesemua fakta relevan keadaan mahkamah sudah tidak tentu menyiasat keadaan subjektif fikiran pihak-pihak tetapi membuat penilaian yang objektif berdasarkan bahan-bahan yang telah dikenal pasti (lihat perenggan 31–32).

(2) Kesimpulan yang tidak dapat dielakkan untuk dibuat adalah bahawa peruntukan penting adalah jaminan minimum untung bersih yang diubah dan bahawa jaminan bank hanyalah suatu peruntukan subsidiari dan adalah berkaitan dengan jaminan keuntungan (lihat perenggan 34).

(3) Klausa 7, sebagai terma kontrak yang khusus dipersetujui antara perayu pertama dan responden, memperuntukkan bahawa apa-apa pelanggaran terhadap jaminan minumun keuntungan bersih yang diubah tidak akan dianggap sebagai suatu keadaan pelanggaran perjanjian pengurusan pada bahagian perayu pertama. Dalam keadaan ini, ia tidak boleh disifatkan bahawa jaminan minimum keuntungan bersih yang diubah adalah obligasi asas perjanjian pengurusan. Ia mesti diikuti, kerana itu, bahawa jaminan bank itu tidak membentuk terma asas perjanjian pengurusan. Klausa 6 jadual untuk perjanjian pengurusan tidak boleh disifatkan sebagai suatu syarat terdahulu kepada perjanjian pengurusan. Mahkamah Tinggi adalah jelas salah dalam hal ini (lihat perenggan 35).

(4) Pada masa material, perayu pertama telah menyerahkan jaminan bank yang diminta oleh responden sebelum notis penamatan dikeluarkan. Responden menerima yang sama tanpa apa-apa protes dan ia akan menjadi tidak berekuiti untuk mereka untuk menegaskan bahawa terdapat kegagalan pada bahagian perayu pertama untuk patuh dengan terma-terma perjanjian pengurusan (lihat perenggan 36).

(5) Pada pembuatan perjanjian pengurusan yang betul, terdapat dua tempoh

masa dalam klausa 6.02 yang mesti dipatuhi oleh responden. Yang pertama adalah klausa 6.02.1(a)(i), yang memerlukan responden untuk memberikan notis 30 hari secara bertulis kepada perayu pertama menyatakan lalai dan memerlukan remedi dalam tempoh masa yang munasabah. Seterusnya, adalah klausa 6.02.1(a)(ii) yang menyatakan bahawa jika keingkaran itu berterusan selama 60 hari selepas menerima notis itu, responden hendaklah memberikan suatu notis secara bertulis yang menyatakan bila penamatan itu hendaklah berkuat kuasa. Mahkamah Tinggi telah terkhilaf apabila gagal untuk secara betul dan secara kehakiman menilai bahawa perjanjian pengurusan pada tafsiran sebenarnya, memerlukan responden untuk memberi notis yang mencukupi kepada perayu pertama untuk memperbaiki kegagalan, kecuaian atau pelanggaran yang diadukan. Mahkamah Tinggi juga terkhilaf apabila gagal untuk menilai bahawa responden dengan melanggar klausa 6.02.1(c)(iii) perjanjian pengurusan melucutkan hak perayu pertama untuk dimaklumkan bila penamatan itu hendaklah berkuat kuasa (lihat perenggan 40).

(6) Tidak ada sebab apa sekalipun untuk responden untuk secara unilateral menamatkan perjanjian pengurusan melalui suatu yang dikatakan notis penamatan. Responden telah secara salah menamatkan perjanjian pengurusan. Responden adalah dan pada setiap masa bertanggungjawab untuk membayar kepada perayu pertama yuran pengurusan yang ditetapkan. Tidak ada sebab kukuh untuk menafikan perayu pertama terhadap kelayakan kontraknya (lihat perenggan 42 & 44–45).]

Notes

For a case on breach, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2962.

Cases referred to

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, HL (refd)

Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 3 All ER 352, HL (refd)

Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm) [1979] Ch 384, Ch D (refd)

NVJ Menon v The Great Eastern Life Assurance Co Ltd [2004] 3 MLJ 38; [2004] 3 CLJ 96, CA (refd)

SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor [2011] 4 MLJ 393, CA (refd)

Saffron Walden Second Benefit Building Society v Rayner (1880) 14 Ch D 406, CA (refd)

UEM Group Bhd v Genisys Intergrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785, FC (refd)

Appeal from: Suit Nos K22–213 of 2009-III and K22–93 of 2009 (High Court, Kota Kinabalu)

Norbert Yapp (Eow Eee Pei with him) (Norbert Yapp & Assoc) for the first and second appellants.
Wong Kian Kheong (Norbert Yapp & Assoc) for the third appellant.
Mau Kam Peng (Mau & Kadir) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal from the whole of the decision of the High Court after a full trial of the matter that arose out of a management agreement dated 29 April 2008 entered into between Sabah Air Aviation Sdn Bhd ('the respondent') on the one part and Borneo Helicopters Sdn Bhd ('the first appellant') on the other part.

[2] This appeal arose from two suits commenced by the first appellant against the respondent namely Suit No K22–93 of 2009-III ('Suit 93') and Suit No K22–213 of 2009 ('Suit 213').

[3] The respondent then counterclaimed in Suit 93 and Suit 213 against three parties, namely the first appellant, Sunildeep Singh Dhalilwal ('the second appellant') and Ronny Cham & Co ('the third appellant') ('the appellants').

[4] Suits 93 and 213 were subsequently consolidated ('the consolidated suits') and tried together.

[5] At the end of the trial, the High Court dismissed with costs the first appellant's claims against the respondent in the consolidated actions; and allowed with costs the respondent's counterclaims against the appellants.

[6] Aggrieved by the decision of the High Court, the appellants appealed to this court against the whole of the decision.

BACKGROUND FACTS

[7] The respondent is a private limited company controlled and wholly owned by the State Government of Sabah ('the Sabah Government') and

carries on as its principle activities of air transportation and aircraft maintenance services. The respondent is the holder of an air service permit issued by the Ministry of Transport and an air operator certificate issued by the Department of Civil Aviation, Malaysia.

[8] In September 2006, a memorandum of understanding ('the MOU') was made between Sabah Government and the first appellant in respect of management takeover of the respondent. It appears that the respondent had been incurring huge losses prior to the involvement of the first appellant. The salient terms of the MOU are as follows:

(a) the management control of the respondent would be contracted to the first appellant for a period of ten years and that the profits, if any, would be shared equally;

(b) the respondent has the responsibility to ensure a smooth transition of the takeover by the first appellant;

(c) in consideration of the management being wholly contracted to the first appellant, the latter agreed to guarantee profits for the respondent in an increasing scale: namely, for the first year RM500,000, the second year RM800,000 and for the third year RM1,000,000;

(d) directors would be appointed from the first appellant to the board of the respondent; and

(e) the first appellant was also given an option to purchase up to 49% of the total paid up shares in the respondent if it was successful in turning around the latter.

[9] Once the MOU was signed, Sabah Government appointed the late Tuan Hj Affendi bin Mohd Fuad Stephens ('Tuan Hj Affendi') as the executive director of the respondent. The second appellant was appointed as the head development of the respondent.

[10] On 5 January 2007, the respondent informed the third appellant that the firm had been included as one of the respondent's panel of legal advisors and solicitors.

[11] On 29 April 2008, the respondent and the first appellant executed a management agreement ('the management agreement'). Under cl 1.02(a) of the management agreement, the management agreement was deemed to have commenced on 1 January 2008 for a period of ten years subject to a periodical review at the end of every five years. It was pursuant to this management agreement that the respondent appointed the first appellant as management contractor to review, re-brand, re-develop and re-organise the respondent with

a view to strengthening the respondent to meet the challenges of the demands of the air transportation and aircraft maintenances services on the terms and conditions therein stated.

[12] On 11 August 2008, pursuant to cl 2.01 and 2.02 of the management agreement, the respondent's board resolved for the appointment of Tuan Hj Affendi as the chief executive officer of the respondent; and the appointment of the second appellant as the executive director and chief operating officer of the respondent.

[13] On 29 January 2009, the respondent wrote to the second appellant seeking for the delivery of a bank guarantee pursuant to cl 6 of the schedule to the management agreement.

[14] On 4 February 2009, the second appellant informed the respondent that the first appellant was in the process of making arrangements to deliver the bank guarantee. On 16 April 2009, Tuan Hj Affendi passed away.

[15] On 4 May 2009, Encik Abdul Ghani bin Pindek ('Abdul Ghani'), the 49% shareholder of the first appellant unilaterally and without the consent of the majority shareholder, conveyed his proposal to amicably surrender the management agreement to the respondent.

[16] As events unfolded, on 6 May 2009 the respondent's board resolved to accept Abdul Ghani's proposal. On the same day, the respondent issued a memo to notify all its staff of the first appellant's intention to amicably surrender the management agreement to the respondent. It was also stated in the memo that the respondent's board had decided that the representative of the first appellant, namely the second appellant and all consultants engaged by him were to be relieved of their roles and responsibilities with immediate effect.

[17] Alongside all this, on 7 May 2009 the first appellant, through the third defendant, filed Suit 93. In Suit 93, the first appellant sought for a declaration that the memo issued on 6 May 2009 by the respondent pertaining to the purported 'amicable surrender' of the management agreement and the relieving of the second appellant and the consultants of their roles and responsibilities is null and void and of no effect. In the same suit, the first appellant also claimed for an order restraining the respondent's new executive chairman from exercising any role or action which overrides, contradicts or is in conflict with the terms and conditions of the management agreement until after the trial of the action. On the same date, the first appellant obtained an ex parte interim injunction to restrain, among others, the respondent from preventing the first appellant from carrying out the management services, roles, responsibilities, duties and functions in accordance with the management agreement.

[18] As we shall see later, Suit 93 has however been overtaken by events, namely, the purported termination by Sabah Air of the management agreement.

[19] Next, on 15 May 2009, the respondent's board resolved, among others, that the respondent would comply with the directive from the Ministry of Finance dated 8 May 2009 and that the second appellant be allowed to carry out the duties of executive director until further notice.

[20] On 26 May 2009, the ex parte interim injunction was set aside upon inter partes hearing.

[21] On 28 May 2009, the first appellant delivered a bank guarantee of RM500,000 to the respondent.

[22] On 4 June 2009, the respondent entered into a helicopter lease agreement with Layang-Layang Udara Sdn Bhd ('the helicopter lease agreement').

[23] An important thing happened on 11 June 2009, wherein the respondent issued a notice of termination of the management agreement ('the termination notice') to the first appellant. The material part of the termination notice is reproduced as follows:

> *NOTICE OF TERMINATION OF MANAGEMENT AGREEMENT*
>
> Take notice that SABAHAIR AVIATION SDN BHD [24758-U] [formerly known as Penerbangan Sabah Sdn Bhd], hereby gives you BORNEO HELICOPTERS SDN BHD [744525-X], written notice of the termination of the Management Agreement dated 29 April 2008 entered into between SABAHAIR AVIATION SDN BHD [24758-U] [formerly known as Penerbangan Sabah Sdn Bhd] of the one part, and BORNEO HELICOPTERS SDN BHD [744525-X] of the other part, inter alia for the following reasons:
>
> 1. Substantial and continuing breach of the Management Agreement by Borneo Helicopters Sdn Bhd, notice of which had been given to you by our letter dated 29 January 2009, of which you replied by letter dated 04 February 2009, promising remedy soonest thereafter, and of which some 133 days thereafter on 28 May 2009 you attempted to remedy but failed.
>
> 2. Deception and misrepresentation by Borneo Helicopters Sdn Bhd to the effect that Borneo Helicopters Sdn Bhd is 'a 100% Sabahan Bumiputra owned company', which as admitted by your director, Mr Sunildeep Singh Dhaliwal, by sworn statement, is and was untrue.
>
> 3. Illegality of and repeated unlawful and illegal acts of Borneo Helicopters Sdn Bhd in purported performance of the Management Agreement.

4. Necessary protection of the public interest of compliance of the law and aviation safety.

Further take notice that you are forthwith to cause all your personnel, directors, agents and servants not to enter or remain within any of our premises, and forthwith to cause to be returned to us all documents and properties of SABAHAIR AVIATION SDN BHD in your possession or that of your directors, agents and servants, and that forthwith you, your directors, agents and servants, are not authorized and are to cease to purport to in any manner to act or deal on behalf of or otherwise in the name of SABAHAIR AVIATION SDN BHD.

[24] Shortly after that on 15 June 2009, the first appellant, through the third appellant issued a demand to the respondent to withdraw the termination notice.

[25] On 10 August 2009, the first appellant demanded the respondent to pay a sum of RM2,453,266 being management fees pursuant to cl 3.01 of the management agreement.

[26] Thereafter on 19 October 2009, the first appellant filed Suit 213 claiming, among others, that the respondent had wrongfully repudiated the management agreement. The first appellant also claimed for payment of the outstanding management fees for the year 2008 amounting to RM2,453,266, liquidated damages in the sum of RM46,612,054; and alternatively, compensatory, exemplary and aggravated damages to be assessed.

[27] On 25 November 2009, the respondent filed its defence and counterclaim in Suit 213. In its counterclaim against the appellants, the respondent alleged fraud and conspiracy in both suits and claimed for, among other, the following reliefs:

(a) compensatory, exemplary and aggravated damages;

(b) a declaration that the third appellant acted in breach of the rules of ethics in acting for the first appellant in conflict with the interest of the respondent and also in negotiating and drafting the management agreement;

(c) a declaration that the management agreement is and was at all material times null and void ab initio and unenforceable by the first appellant; and

(d) alternatively, a declaration that the management agreement had been duly terminated.

[28] It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test'

(see the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 and *UEM Group Bhd v Genisys Intergrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785).

TERMINATION OF THE MANAGEMENT AGREEMENT

[29] One of the crucial issue in this appeal is whether the management agreement had been validly terminated by the respondent vide the termination notice dated 11 June 2009. On this issue, the High Court held:

> The persistent breach by Borneo Helicopters of cl 6 of the agreement effectively destroyed the very root and essence of the contractual relationship between the parties and indeed the nature of the commercial venture contemplated by the agreement — that Sabah Air is to have the minimum profit guarantee independently secured by a collateral and security in the form of a bank guarantee. Construed in a commercially sensible manner cl 6 read with cll 4, 5, 6 and 7.08 of the agreement can only mean that the bank guarantee must without fail be delivered the moment the agreement was entered into which by virtue of cl 1.02(a) means on 1 January 2008. This date had long passed when the RM500,000 bank guarantee was delivered by Borneo Helicopters on 28 May 2009. Thus, Borneo Helicopters' claim that the agreement was wrongfully terminated by Sabah Air is unsustainable.

[30] The High Court concluded that the first appellant's failure to provide a bank guarantee constitutes a fundamental breach entitling the termination of the management agreement by the respondent. It was the contention of learned counsel for the respondent that the management agreement expressly provides that the first appellant is to deliver a bank guarantee in the sum of RM500,000 to the respondent the moment the management agreement was entered into between the parties. Learned counsel argued that the first appellant breached this term from day one of the management agreement.

[31] It must be pointed out that by cl 6.02.1 of the management agreement, it is expressly provided that neither party can terminate the management agreement unilaterally except upon an 'Event of Default'. The termination notice, which we have reproduced it earlier, did not refer to any clauses in the management agreement.

[32] The management agreement is a commercial contract. It therefore must be construed in a commercially sensible manner, that is to say, in a manner in which a reasonable commercial person would construe them (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352). The construction of a contract is a question of law to be determined by the court and the court is not bound by the admission of witnesses or the concession made by counsel (see *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38; [2004] 3 CLJ 96). To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words

used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intention, the court does not of course inquire into the parties' subjective states of mind but make an objective judgment based on the materials already identified (see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896).

[33] For the proper determination of the issue whether the bank guarantee form a fundamental term of the management as decided by the High Court, it is important to take a closer look at cll 4, 5 and 6 of the schedule to the management agreement as follows:

> Clause 4: Notwithstanding any provision to the contrary, in the event that Penerbangan Sabah's Group Adjusted Net profit for the first year of this Agreement as finalized in the audited account of Penerbangan Sabah shall be less than the sum of RM500,000.00 (calculated from the Commencement date to the 31st day of December 2008) the Management Contractor shall pay to Penerbangan Sabah the shortfall out of the sum of RM500,000.00 as Penerbangan Sabah's minimum guaranteed sum. The shortfall shall be calculated as the minimum guaranteed sum less the Group Adjusted Net Profit in respect of the second year, the guaranteed minimum sum shall be RM800,000.00 and in respect of the remaining term of this Agreement, the sum shall be RM1,000,000.00. For the avoidance of doubt, the Management Contractor shall not be liable for any loss whatsoever which Penerbangan Sabah may suffer during the course of this Agreement.
>
> Clause 5: The said guaranteed minimum sum shall be paid by the Management Contractor to Penerbangan Sabah within one (1) month from the date for the audited account for the relevant year.
>
> Clause 6: The Management Contractor shall provide a Bank Guarantee on terms acceptable to Penerbangan Sabah for the full amount of the Minimum Profit Guarantee at the commencement of each financial year.

[34] From the above cls, the irresistible deduction to be drawn is that the crucial provision is the minimum guaranteed adjusted net profit and that the bank guarantee is only a subsidiary provision and is incidental to the profit guarantee. In this regard, it is important to point out that cl 7 of the schedule to the management agreement expressly provides as follows:

> For the avoidance of doubt, notwithstanding any provision to the contrary, the failure to achieve the minimum guaranteed adjusted net profit of Penerbangan Sabah for any given year shall not be construed as an event of default.

[35] In our view, cl 7 as a contractual term specifically agreed between the first appellant and the respondent, provides that any breach of the minimum guaranteed adjusted net profit shall not be deemed as an event of default of the management agreement on the part of the first appellant. In this way, it cannot

be construed that the minimum guaranteed adjusted net profit is a fundamental obligation of the management agreement. It must follow, therefore, that the bank guarantee does not form a fundamental term of the management agreement. For that reason cl 6 of the schedule to the management agreement cannot be deemed to be a condition precedent to the management agreement. The High Court was plainly wrong in this regard.

[36] In any event, at the material time, the first appellant had already tendered the bank guarantee requested by the respondent on 28 May 2009 before the termination notice was issued (see appeal record Vol 5 pp 1516–1517). The respondent accepted the same without any protest and it would be inequitable for them to assert now that there was a failure on the part of the first appellant to comply with the terms of the management agreement.

[37] More than that, by article VI cl 6.02 of the management agreement, the first appellant and the respondent agreed that neither party can terminate the management agreement or any component part of the management services unilaterally except upon the happening of the several events of default stated therein, in particular, under the relevant part of art VI cl 6.02.1(a) which states:

> (a) On Management Contractor's Default
>
> (i) If the Management Contractor commits, permits or suffers to occur any breach or default of the obligations on the part of the Management Contractor under this Agreement or any component part of the Management Services and unless the non-performance or non-observance has been waived or excused in writing by Penerbangan Sabah, Penerbangan Sabah shall give thirty (30) days notice in writing to the Management Contractor specifying the default and requiring remedy thereof within reasonable time and the Management Contractor defaulting;
>
> (ii) If the Management Contractor shall continue such default for sixty (60) days after the receipt of such notice referred to in Sub-cl (i) above Penerbangan Sabah shall, without prejudice to any other rights or remedies it may possess, terminate this Agreement forthwith or the relevant component part of the Management Services by way of a notice in writing specifying when such termination shall take effect;
>
> (iii) Notwithstanding the above, Penerbangan Sabah shall continue to make such payment or other payment of the Management Fees which is due and payable under the terms of this Agreement until the date of such termination; and
>
> (iv) Similarly, the Management Contractor shall continue to pay Penerbangan Sabah the sum due for minimum guaranteed share of the adjusted net profit payment under the terms of this Agreement until the date of such termination.

[38] In this regard, learned counsel for the respondent submitted that the High Court was correct in holding that the 'Default Notice' dated 29 January 2009 as sufficient compliance with the requirements of cl 6.02.1(a)(1). The material part of the letter addressed to the chief executive officer of the first appellant is reproduced as follows:

> BAYARAN BANK GUARANTEE BERJUMLAH RM500,000 OLEH BORNEO HELICOPTERS SDN BHD KEPADA SABAH AIR AVIATION SDN BHD SEPERTIMANA DALAM PERJANJIAN PENGURUSAN BERTARIKH 29 APRIL 2003
>
> Reference is made to the above subject matter and to the Ministry of Finance's letter dated 29th January 2009.
>
> We will be grateful if you could confirm the status of the Bank Guarantee as stipulated in Clause 6 of the Schedule to the Management Agreement dated 29th April 2008 signed between SabahAir Aviation Sdn Bhd and Borneo Helicopters Sdn Bhd. Your prompt attention in the delivery of the Bank Guarantee is much appreciated.
>
> Thank you.

[39] In our view, the explicit and unambiguous language of the letter is clear and plain enough. As submitted by learned counsel for the first appellant, the letter is simply a letter from the respondent seeking confirmation from the first appellant the provision of bank guarantee. It refers the letter dated 29 January 2009 from the Ministry of Finance which asks for a confirmation from the respondent whether or not the first appellant have furnished the bank guarantee of RM500,000. It then seeks a confirmation from the first appellant on the status of the bank guarantee and ends with a request for prompt delivery of the bank guarantee. In our judgment, the letter of 29 January 2009 cannot be regarded as a notice of default as required under cl 6.02.1(a)(i) of the management agreement.

[40] In our judgment, on a proper construction of the management agreement, there are two time periods in cl 6.02 which must be complied by the respondent. The first is cl 6.02.1(a)(i), which requires the respondent to give a 30 days' notice in writing to the first appellant specifying the default and requiring remedy thereof within reasonable time. Next, is cl 6.02.1(a)(ii) which states that if the default shall continue for 60 days after receipt of such notice, the respondent shall give a notice in writing specifying when such termination shall take effect. We agree with the contention of learned counsel for the first appellant that both are mandatory requirements. In our judgment, the High Court erred in failing to properly and judicially appreciate that the management agreement on its true construction, requires the respondent to give adequate notice to the first appellant to make good the failure, neglect or contravention complained of when the same is explicitly stated in cl 6.02.1(a)(i). The High Court also erred in failing to appreciate that the

respondent had in breach of cl 6.02.1(c)(iii) of the management agreement deprived the first appellant the right to be informed when the termination shall take effect.

[41] Having regard to the evidence contained in the appeal record and after reading the judgment of the High Court, we also conclude that the respondent has failed to prove any merit regarding its other causes of action, that is to say, alleged misapplications of monies by the first and second appellants, issue pertaining to helicopter lease agreement dated 4 June 2009 entered into with Layang-Layang Udara Sdn Bhd, alleged deception on the public administration and alleged conspiracy to defraud. We do not feel that further elaboration is necessary on these issues considering the fact that parties in the main argued on matters relating to the bank guarantee and cl 6.02.1, which we have discussed earlier.

[42] By reasons thereof, there is no basis whatsoever for the respondent to unilaterally terminate the management agreement vide the so-called termination notice dated 11 June 2009. In consequence, we conclude that the respondent had unlawfully terminated the management agreement.

MANAGEMENT FEES FOR THE YEAR 2008 AMOUNTING TO RM2,453,266

[43] The first point to note is that this claim by the first appellant is distinct from the claim for wrongful termination.

[44] Now, pursuant to article 111 cl 3.01 of the management agreement, the respondent was and is at all material times liable to pay to the first appellant management fees stipulated and set-out in the schedule to the management agreement.

[45] Evidently, the respondent had made profits in the year 2007 and 2008 when it was being managed by the first appellant. In its audited financial statements for the year ending 31 December 2008, it is recorded at p 39 that there is a sum of RM2,453,266 due to the first appellant for management fees for the year ending 31 December 2008. In this regard, learned counsel for the respondent contended that the sum is a 'contingent liability'. We cannot accept this contention as the said sum appears under the 'related parties' heading and not the 'contingent liabilities'. In the audited financial statements, it is clearly stated that the management fees due is a transaction and not a contingent liability. In the circumstances, we conclude that the first appellant is therefore contractually entitled to claim the agreed remuneration for which it has not been paid since it started carrying out the management services way back in

September 2006. There is no valid reason to deny the first appellant of its contractual entitlements. This point was ignored by the High Court.

THE RESPONDENT'S CLAIM AGAINST THE THIRD APPELLANT

[46] In the main, the respondent's claim against the third appellant was for breach of duty owned by an advocate and solicitor to its client, the respondent. The High Court held that having regard to the totality of the evidence and the surrounding circumstances of the case, there was a concerted and premeditated course of conduct on the part of the third appellant which was calculated to benefit the first and second appellants at the expense of the respondent. The High Court further held that events that transpired after the signing of the management agreement confirmed that the third appellant's undivided loyalty had always been with the first appellant, and this continued after the appointment of the third appellant as solicitors for the respondent. The High Court concluded that the third appellant failed in his basic duty to protect the interest of the respondent. Thus, according to the High Court, conspiracy had been proved against the third appellant beyond any reasonable doubt.

[47] It appears that the High Court's findings against the third appellant was based from its conclusion that there existed a retainer between the third appellant and the respondent by virtue of the latter's letter dated 5 January 2007 informing the third appellant that the firm was included as the respondent's panel of legal advisors and solicitors. The material part of the letter is reproduced as follows:

> RE: PANEL OF SOLICITORS
>
> We refer to the above subject.
>
> We are pleased to inform you that we would like to include your firm as one of our panel of legal advisors and solicitors and shall be pleased to call on your firm for further legal work in the future. Thank you.

[48] With all respect, the High Court was plainly wrong in finding that a retainer had existed between the third appellant and the respondent by virtue of the above letter. The respondent letter only states that the third appellant had been included as the respondent's panel of legal advisors and solicitors and nothing more. In *Saffron Walden Second Benefit Building Society v Rayner* (1880) 14 Ch D 406, James LJ held:

> I have had occasion several times to express my opinion about the fallacy of supposing that there is such a thing as the office of solicitor, that is to say, that a man has got a solicitor not as a person whom he is employing to do some particular business for him, either conveyancing, scrivening, or conducting an action, but as an official solicitor, and that because the solicitor has been in the habit of acting for him or been employed to do something for him, that solicitor is his agent to bind him by anything that he says, or to bind him by receiving notices or information.

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> There is no such officer known to the law. A man has no more a solicitor in that sense than he has an accountant, or a baker, or butcher. A person is a man's accountant, or baker, or butcher, when the man chooses to employ him or deal with him, and the solicitor is his solicitor when he chooses to employ him and in the matter in which he is so employed.

B

[49] In *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)* [1979] Ch 384, Oliver J held:

> There is no such thing as a general retainer in that sense. The expression 'my solicitor' is as meaningless as the expression 'my tailor' or 'my bookmaker' in establishing any general duty apart from that arising out of a particular matter in which his services are retained. The extent of his duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do.

C

D

[50] As correctly submitted by learned counsel for the third appellant, the law does not recognise a 'general retainer' or a 'standing solicitor'; and there is no such general relationship as that of solicitor and client of a standing and permanent character upon all occasions and for all purposes.

E

[51] We now turn to consider the issue of conspiracy, which the High Court concluded has been established against the third appellant beyond any reasonable doubt. In *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393, the Court of Appeal held that in order to succeed in a claim based on the tort of conspiracy, the plaintiff must establish an agreement between two or more persons; for the purpose of injuring the plaintiff; and acts done in the execution of that agreement resulted in damage to the plaintiff.

F

[52] The High Court concluded that conspiracy was established against the third appellant on the basis, among others, of the following circumstances. The appellants were in one mind when facing the respondent during the negotiation process for the management agreement. The third appellant failed to ensure that the first appellant delivered the bank guarantee to the respondent. The third appellant failed in their basic duty to protect the interest of the respondent. The third appellant took legal action against the respondent in respect of the management agreement while remaining on record as solicitor for the respondent.

G

H

[53] We have closely scrutinised the judgment of the court. In our view, with respect, there was insufficient judicial appreciation of the entire evidence of the appellants. It is the duty of the High Court to consider the full evidence including the evidence which favours the appellants. In this regard, the third appellant was not involved in the preparation of the MOU between Sabah Government and the first appellant in respect of management takeover of the

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respondent. The important point to note is that the third appellant was engaged by the first appellant to prepare a draft management agreement. In this way, the third appellant owed a duty to the first appellant in ensuring the latter's interest was protected under the management agreement during the negotiation process with the respondent. At the material time during the negotiation of the draft management agreement, the respondent was advised by the Sabah State Attorney General.

[54] Based on the facts and the prevailing surrounding circumstances, we agree with the submissions of learned counsel for the third appellant that the High Court has erred in concluding that the claim for conspiracy has been established against the third appellant. This warrants appellate intervention.

CONCLUSION

[55] Based on all the above mentioned reasoning, we made the following orders:

(a) we allow the appellants' appeals;

(b) we set aside the orders of the High Court against the appellants;

(c) judgment is entered against the respondent in the sum of RM2,453,266 in favour of the first appellant being the outstanding management fees for the year 2008 with interest on the said sum at the rate of 8%pa from 21 August 2009 to the date of full payment;

(d) in respect of damages as a result of the respondent's wrongful termination of the management agreement, we order that there be an assessment by the registrar of the High Court as per prayer 3 of Suit 213;

(e) we order that the respondent to pay costs of this appeal and the court below in the sum of RM100,000 to the first and second appellants; and RM50,000 to the third appellant; and

(f) we order the deposits to be refunded to the appellants.

Appeals allowed and orders of the High Court set aside.

Reported by Afiq Mohamad Noor